In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. W. NEELY, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal for the southern district of New York.

Nos. 387 and 406.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

We ask the indulgence of the court in submitting in reply to the supplemental brief for the appellant a short reply:

I.

We wish, in the first place, to correct two inadvertent errors in our own brief. The first is on page 62, when we said, in stating the facts of *Cross* v. *Harrison* (16 How., 164), that "the duties under the war tariff were collected

from the ratification of the treaty to the day that the collector entered upon his duties." This is an error. The duties under the war tariff were collected by the military governor from the ratification of the treaty until the receipt in California of official notice of such ratification. Thereafter the military governor continued to exact duties on imports, but charged the rate then provided by the general revenue laws of the United States upon imports. The error does not affect the value of the authority, because this court held that the war duties were properly exacted from the date of the treaty, which was February 3, 1848, until August 7, 1848, when, upon receipt of official advices as to the ratification of the treaty, the military governor announced the cession of California to the United States. It is also to be observed that while the military governor did change the rates of duties so that they would accord with those imposed by the general revenue laws, yet these duties were exacted, not by any civil officer of the United States, but by the military governor, whose government, under the law of belligerent right, was maintained until California had been admitted into the Union; and, as has been said, this court affirmed the propriety of this course.

In this connection we also wish to call attention to the case of *Thirty Hogsheads of Sugar* v. *Boyle* (9 Cranch, 191). This was an appeal from the decree of the circuit court of Maryland condemning 30 hogsheads of sugar, the property of the claimant, a Danish subject, the sugar being the product of his plantation in Santa Cruz, and shipped, after the capture of that island by the British, to a house in London for the account of the claimant.

Santa Cruz had capitulated to the English forces, and during the period of possession, and during our war of 1812, the sugar was captured. Chief Justice Marshall delivered the opinion of the court and sustained the validity of the seizure. He said:

> Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet, to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

Similarly we argue that our right to govern Cuba under the law of belligerent right remains as long as this Government is in possession of it and until we shall see fit to surrender it.

The second error will be found on page 81 of our brief, where, in discussing the case of *Callan* v. *Wilson*, we say that Congress "expressly made the Constitution applicable to the State of Maryland." "State of Maryland" should read "District of Columbia."

II.

In the supplemental brief the learned counsel for appellant radically changes the nature of his contention. He now claims that the act of June 6, 1900, is in effect a treaty, and, for this reason, invalid. If it is a treaty,

its validity can not be questioned on the ground hitherto suggested by the appellant, that it is legislation for another country, for all treaties necessarily carry with them consequences which affect both of the contracting powers. In the nature of things, they have an extraterritorial application. If, therefore, the act of June 6, 1900, is a treaty, as the appellant now argues, his entire argument as outlined in his main brief necessarily falls.

He, however, suggests that it is void because it has not been ratified in the constitutional manner. We broadly challenge the assertion that this act of Congress can in any wise be regarded as a treaty. A treaty is "a formal agreement or compact, duly concluded and ratified between two or more nations." (See Standard Dictionary.) It must not only be a treaty in form, but it must be between two nations. There is no such thing as a unilateral treaty; it is an impossibility. Applying this to the act of June 6, 1900, we ask: With what nation have we executed this treaty? Upon what nation does it confer rights or impose obligations? It can not be a treaty with the republic of Cuba, for the existence of no such republic has been officially recognized. But even if there were such a republic, when did it assent to the treaty? Where was it signed? Where were the ratifications exchanged? The statement of the proposition carries with it its refutation. The appellant's learned counsel says that this act "certainly is the assumption of a relation toward a foreign government." What foreign government? In any event there are many assumptions of relations to foreign governments which in no sense are treaties. The

President receives an ambassador, and thereby assumes a relation to a foreign government. Is such reception treaty? Congress passes an act to establish consular courts. Is such act a treaty? If an extradition statute is a treaty, then every extradition statute from the beginning of the Government has been absolutely void. In all the intercourse between sovereign nations it has never been suggested by any diplomat, statesman, judge, or text writer that an extradition statute is a treaty until the learned counsel suggests it in the case at bar.

The two cases cited of *Holmes* v. *Jennison* (14 Pet., 540) and *People* v. *Curtis* (50 N. Y., 321) are not in point. They merely rule that, as between the States of the Union and the Federal Government, the matter of extradition is wholly for the Federal Government, and that the States can not therefore by statute provide for the extradition of fugitive criminals.

III.

The effort of appellant's counsel to avoid the force of the reasoning in the *Ross Case* (140 U. S., 453) seems to us without result. He argues (supplemental brief, p. 18) that the decision of this court was not placed upon the ground that the United States could "exercise the jurisdiction or enforce the laws of the United States" in such consular courts, but was on the ground that, by immemorial usage, the treaty-making power had authority to accept "an authority in another country."

This seems to us a distinction without a difference, for, in the Ross case, as in the case at bar, the question was

the validity of acts of Congress in other countries. Of course, in both cases the right to legislate must be due either to the law of belligerent right, or to some authority conferred by treaty, or to the immemorial usage of nations. In the Ross case the right to legislate for a consular tribunal in Japan was sustained, not only because of the treaty between Japan and the United States, which permitted us to administer justice and execute our laws upon Japanese territory, but also because of the usage of nations with respect to the maintenance of such tribunals "in other than Christian countries." As this court showed, this right had been recognized by "a long and uniform acquiescence by the executive, administrative, and legislative departments of the Government in the validity of the legislation." Similarly, in the case at bar, the right to legislate for a country which we are occupying under the law of belligerent right exists by the usage of nations, and is further confirmed by the treaty of Paris, which confirmed our possession of Cuba and imposed upon us the obligation of governing it until such time as we deem it wise to relinquish such possession. The duty of government must carry with it the necessary power and authority to provide legislation, and the point of the Ross case is that such portions of the Constitution as are applicable to the recognized courts within the acknowledged boundaries of the United States have no application to courts or countries where we exercise jurisdiction, which, in a certain sense, is extraconstitutional, although it is attributable to the war-making and treaty-making powers conferred by the Constitution upon the President and Congress.

IV.

The main premise from which appellant's counsel makes his deduction as to the constitutionality of the act of June 6, 1900, is the assertion that the joint resolution of April 20, 1898, was a recognition of the existence of the Cuban republic. We have already pointed out the fact that the proviso providing for such recognition was stricken out by Congress, which thus affirmatively refused to accord it. A reference to the debates in Congress will make this perfectly plain. In the special message of the President of April 11, 1898, which preceded the action of Congress, the President at some length argued against the recognition of the Cuban republic. He quoted from President Jackson's message of December 21, 1836, in which that President had advised against the recognition of the Republic of Texas, and also referred to the similar refusal of President Grant, who, in 1875, "after seven years of sanguinary, destructive, and cruel hostilities in Cuba," "reached the conclusion that the recognition of the independence of Cuba was impracticable and indefensible; and that the recognition of belligerence was not warranted by the facts according to the tests of public law." President McKinley then referred to his previous annual message of December, 1897, in which he had advised against the recognition of the alleged republic of Cuba. Continuing, President McKinley says, in his special message of April 11, 1898:

> These are the words of the resolute and patriotic Jackson. They are evidence that the United States, in addition to the test imposed by public law as the

condition of the recognition of independence by a mutual state (to wit, that the revolted state shall "constitute in fact a body politic, having a government in substance as well as in name, possessed of the elements of stability," and forming de facto, "if left to itself, a state among the nations, reasonably capable of discharging the duties of a state"), has imposed for its own government in dealing with cases like these the further condition that recognition of independent statehood is not due to a revolted dependency until the danger of its being again subjugated by the parent state has entirely passed away.

This extreme test was, in fact, applied in the case of Texas. The Congress to whom President Jackson referred the question as one "probably leading to war," and therefore a proper subject for "a previous understanding with that body by whom war can alone be declared and by whom all these provisions for sustaining its perils must be furnished," left the matter of the recognition of Texas to the discretion of the Executive, providing merely for the sending of a diplomatic agent when the President shall be satisfied that the Republic of Texas has become "an independent State." It was so recognized by President Van Buren, who commissioned a chargé d'affaires March 7, 1837, after Mexico had abandoned an attempt to reconquer the Texan territory, and when there was at the time no bona fide conquest going on between the insurgent province and its former sovereign.

I said in my message of December last: "It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of Statehood, which alone can demand the recognition of belligerency in its favor." The same requirement must certainly be no less seriously considered

when the graver issues of recognizing independence is in question, for no less positive test can be applied to the greater act than to the lesser; while, on the other hand, the influences and consequences of the struggle upon the internal policy of the State, which form important factors when the recognition of belligerency is concerned, are secondary, if not rightly eliminable, factors when the real question is whether the community claim recognition is or is not independent beyond peradventure.

Nor from the standpoint of expediency do I think it would be wise or prudent for this Government to recognize at the present time the independence of the so-called Cuban Republic. Such recognition is not necessary in order to enable the United States to intervene and pacify the islands. To commit this country now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization so recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We would be required to submit to its direction and to assume to it the mere relation of a friendly ally.

When it shall appear hereafter that there is within the island a government capable of performing the duties and discharging the functions of a separate nation, and having, as a matter of fact, the proper forms and attribute of nationality, such government can be promptly and readily recognized, and the relations and interests of the United States with such nation adjusted.

Thereupon a prolonged, and to some extent acrimonious, debate took place both in the Senate and in the House, in which the principal point at issue was the

justice and wisdom of acknowledging the independence of the republic of Cuba. The majority in the Senate and House, following the recommendation of the President, advised against such recognition, but there was in both Houses a determined minority, who insisted upon the recognition being inserted in the joint resolution for intervention. The Senate struck out the proviso providing for such recognition, but in the House of Representatives the majority report of the Committee on Foreign Affairs, which excluded such recognition, was defeated, and an amendment inserted which provided for such recognition. The resolution then went into a conference which was the subject of at least two reports to the Senate and the House, neither of which body would recede from its position, until on April 18, 1898, the House receded and the joint resolution was passed without the recognition of the alleged Cuban republic. (See Congressional Record, Fifty-fifth Congress, second session, pp. 3810, 3813, 3820, 3847, 3988, 3993, 4017, 4027, 4033, 4037, 4039, 4041, 4043, 4060, 4061, 4062, 4064, 4066, 4085, 4112.)

The history of the legislation, therefore, shows that the exclusion of the clause recognizing the Cuban republic was not a mere legislative inadvertence, or without meaning. On the contrary, as has been said, the matter was the subject of extended debate and decisive action, and the language of the joint resolution must be read in the light of its history. So considered, it is clear that Congress, far from recognizing the existence of a Cuban republic, deliberately and affirmatively refused to recognize it.

V.

The appellant finally argues that if Cuba be not foreign territory, the act of June 6, 1900, does not apply, notwithstanding his previous demonstration of the fact that the act was passed with the incidental purpose of extraditing the appellant. It is enough to say that we have not said that Cuba is not foreign territory. We have said that the act of Congress correctly describes it as foreign territory, which is at present occupied and controlled by the United States under the war-making and treaty-making power.

Respectfully submitted.

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